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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1164

DEBORAH A. NORTHCROSS, *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

The petitioners Deborah Northcross *et al.* respectfully pray that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 24, 1972.

Opinion Below

The Court of Appeals issued no opinion in support of its order of November 24, 1972. That order appears in the Appendix hereto.

The Court of Appeals issued opinions at earlier stages in this proceeding on June 7, 1971, which is reported at

444 F.2d 1179, and on August 29, 1972, which is reproduced in the Appendix to the Petition for a Writ of Certiorari filed in No. 72-677. The District Court for the Western District of Tennessee issued opinions at earlier stages in this proceeding on May 1, 1970, reported at 312 F. Supp. 1150, and on December 10, 1971 and April 20, 1972, both reproduced in the Appendix to the Petition for a Writ of Certiorari filed in No. 72-677.

Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 24, 1972. This petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Did the Court of Appeals err in denying plaintiffs costs and attorneys fees?

Statutory Provisions Involved

Section 718 of the Emergency School Aid Act of 1972, 86 Stat. 235, provides:

> SEC. 718. Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof) or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and sec-

ondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Statement of the Case

This case was commenced over a decade ago to desegregate the public schools of Memphis. The latest round of litigation derives from the decision of the Sixth Circuit Court of Appeals in 1971 directing the District Court to reconsider the desegregation plans for the Memphis public schools in the light of this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

In April, 1972, after extensive hearings, the District Court ordered into effect a new desegregation plan to eliminate the vestiges of the dual school system in Memphis. Both plaintiffs and defendants appealed from the order of the District Court. On August 29, 1972 the Sixth Circuit ruled in favor of the plaintiffs on all questions, granting plaintiffs' request for an order directing the District Court to prepare a timetable for further desegregation, and affirming over defendants' objections the District Court's order for the 1972-1973 school year. On February 20, 1973, this Court denied the school board's petition for a writ of certiorari to review the decision of August 29, 1972. *Board of Education of Memphis City Schools* v. *Northcross*, No. 72-677.

Plaintiffs' complaint, filed on March 31, 1960, expressly sought costs as part of the relief prayed for. On September 7, 1972, plaintiffs filed a timely Bill of Costs in

connection with the August 29 decision, pursuant to Federal Rule of Appellate Procedure 39(c). On October 25, 1972, counsel for plaintiffs were first notified by the Clerk of the Sixth Circuit that the court had directed that costs not be taxed in favor of plaintiffs.[1] On November 3, 1972, plaintiffs petitioned the Sixth Circuit for rehearing, and urged that the judgment and mandate of the court be amended to award plaintiffs their costs, including a reasonable attorneys fee as part thereof.[2] On November 24, 1972, the Court of Appeals denied the petition for rehearing and separately and expressly denied plaintiffs' requests for costs and attorneys fees.

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[1] The majority opinion of the panel issued August 29, 1972, contains no reference to the matter of costs. The words "no costs allowed" appeared at the end of the *dissenting* opinion and were not separately paragraphed. The transmittal letter of the Clerk of the Sixth Circuit, dated August 29, 1972, contained no mention of costs. The mandate of the Sixth Circuit, issued October 5, 1972, was not furnished to counsel for the parties. On October 13, 1972, plaintiffs' counsel wrote to the clerk of the Sixth Circuit inquiring as to the disposition with respect to costs. On October 25, 1972, counsel for plaintiffs received a letter from the clerk stating that, "at the direction of the court," no costs had been taxed in the mandate of October 5. Whether the clerk found this direction in the August 29 opinion or received it at some later time was not disclosed.

[2] Because of the delay in notification the petition was accompanied by a motion for leave to file petition out of time. Defendants opposed the petition for rehearing on the merits thereof but did not question its timeliness.

REASONS FOR GRANTING THE WRIT

This is the first case to reach this Court arising under section 718 of the Emergency School Aid Act of 1972. Section 718 expressly authorizes the federal courts to award a reasonable attorney's fee as part of costs to the prevailing party in school desegregation cases. The statute provides:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof) or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 718 became law on July 1, 1972.

In their petition for rehearing in the Court of Appeals seeking costs including a reasonable attorney's fee, petitioners explicitly called the court's attention to section 718. Petitioners urged that the section clearly applied to the instant case, and that under the facts an award of legal fees was mandatory. The Sixth Circuit denied both costs and legal fees without opinion.

The decision reached by the Sixth Circuit in this case is at odds with contemporaneous decisions handed down in

Section 718 cases by the Fourth and Fifth Circuit Courts of Appeals. The opinions of those courts in *Johnson* v. *Coombs* and *Thompson* v. *School Board of Newport News* are reproduced in the Appendix hereto.

Both the Fourth and Fifth Circuits would require the award of attorney's fees for services rendered after the effective date of the Act, regardless of when the action involved was commenced. *Johnson* v. *Coombs*, p. 2a; *Thompson* v. *School Board of Newport News*, p. 6a. In this case substantial services were rendered after the enactment of the statute on July 1, 1972; the appeal itself was argued on July 16, 1972.

While section 718 states that the federal courts "may" award attorney's fees under the circumstances described, the Fifth Circuit correctly construed the statute to require the award of such fees in the absence of special circumstances rendering such an award unjust. In *Johnson* the court, noting the similarity of language and purpose between section 718 and Title II of the 1964 Civil Rights Act, explicitly adopted this Court's standard announced in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), p. 9a. In the instant case the Sixth Circuit did not find any circumstances rendering the award of attorney's fees unjust, and none exist.

The result reached by the Sixth Circuit in this case is entirely inconsistent with that reached by the Fifth Circuit in *Johnson* under virtually identical circumstances. Here, as in *Johnson*, legal fees were sought, *inter alia*, for services rendered in prosecuting an appeal after the effective date of the Act in an action commenced before that date. Here, as in *Johnson*, there were no special circumstances found, shown, or even argued which would have made an award unjust. Here, as in *Johnson*, the plaintiffs had succeeded in compelling the defendant school board

to abolish a de jure dual school system. Yet here, unlike *Johnson*, attorneys' fees were denied.

The Sixth Circuit's failure to explain its denial of costs and attorney's fees obscures the exact nature of its disagreement with the interpretation of section 718 adopted by the Fourth and Fifth Circuits. But the rule adopted in this case, however unclear its rationale, is of course binding upon the district courts in the Sixth Circuit. Conflicts between the circuits regarding a plaintiff's rights to attorney's fees in school desegregation cases should not be countenanced merely because one of the appellate courts involved declines to enunciate the basis of its decisions.

It is particularly important that this Court clarify the meaning of section 718 because of its impact on private parties seeking to enforce the commands of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and its progeny. Since this Court's decision in *Brown*, Negro school children and their parents have been responsible for the bulk of the school desegregation litigation in the United States. That litigation has often proved lengthy and complicated; the instant plaintiffs have been pursuing this case in the Federal courts for 13 years. Yet while the public officials opposing them were able to draw upon tax dollars to fight the integration of the public schools, private citizens have all too often been forced to bear their own expenses. It was to end this obvious injustice that Congress enacted section 718, and a writ of certiorari is necessary to assure that Congress' desires are not frustrated in the Sixth Circuit.

The result reached by the Sixth Circuit in this case is inconsistent with a number of decisions in other circuits awarding attorney's fees to plaintiffs suing to enforce important congressional or constitutional policies even in the absence of an express statutory authorization of such fees. *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143

(5th Cir. 1971); *Knight* v. *Auciello*, —— F.2d —— (1st Cir. 1972); *N.A.A.C.P.* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972); *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972); *Cooper* v. *Allen*, —— F.2d —— (5th Cir. 1972); *Wyatt* v. *Stickney*, —— F. Supp. —— (M.D. Ala. 1972); *Ford* v. *White*, —— F. Supp. —— (S.D. Miss. 1972); *La Raza Unida* v. *Volpe*, —— F. Supp. —— (N.D. Cal. 1972); *Ross* v. *Goshi*, —— F. Supp. —— (D. Hawaii 1972). Litigation such as this benefits all students, black and white, and imposing plaintiff's legal fees on the defendant school board effectively transfers that expense to the entire class benefiting from it. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). After almost two decades of litigation under *Brown*, full relief under 42 U.S.C. § 1983 requires that the victims of discrimination no longer be forced to bear the constant and crushing burden of enforcing their constitutionally accorded rights. *Clark* v. *Board of Education of Little Rock School District*, 449 F.2d 493 (8th Cir. 1971), 369 F.2d 661 (8th Cir. 1966). Petitioners submit that the award of legal fees under section 718 should not be limited to fees for services rendered after July 1, 1972, but should extend to all cases still pending on that date. *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268 (1969). Certainly in a case such as this the Court of Appeals was unjustified in denying to plaintiffs as the prevailing party on appeal the costs authorized by Rule 39, Federal Rules of Appellate Procedure.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

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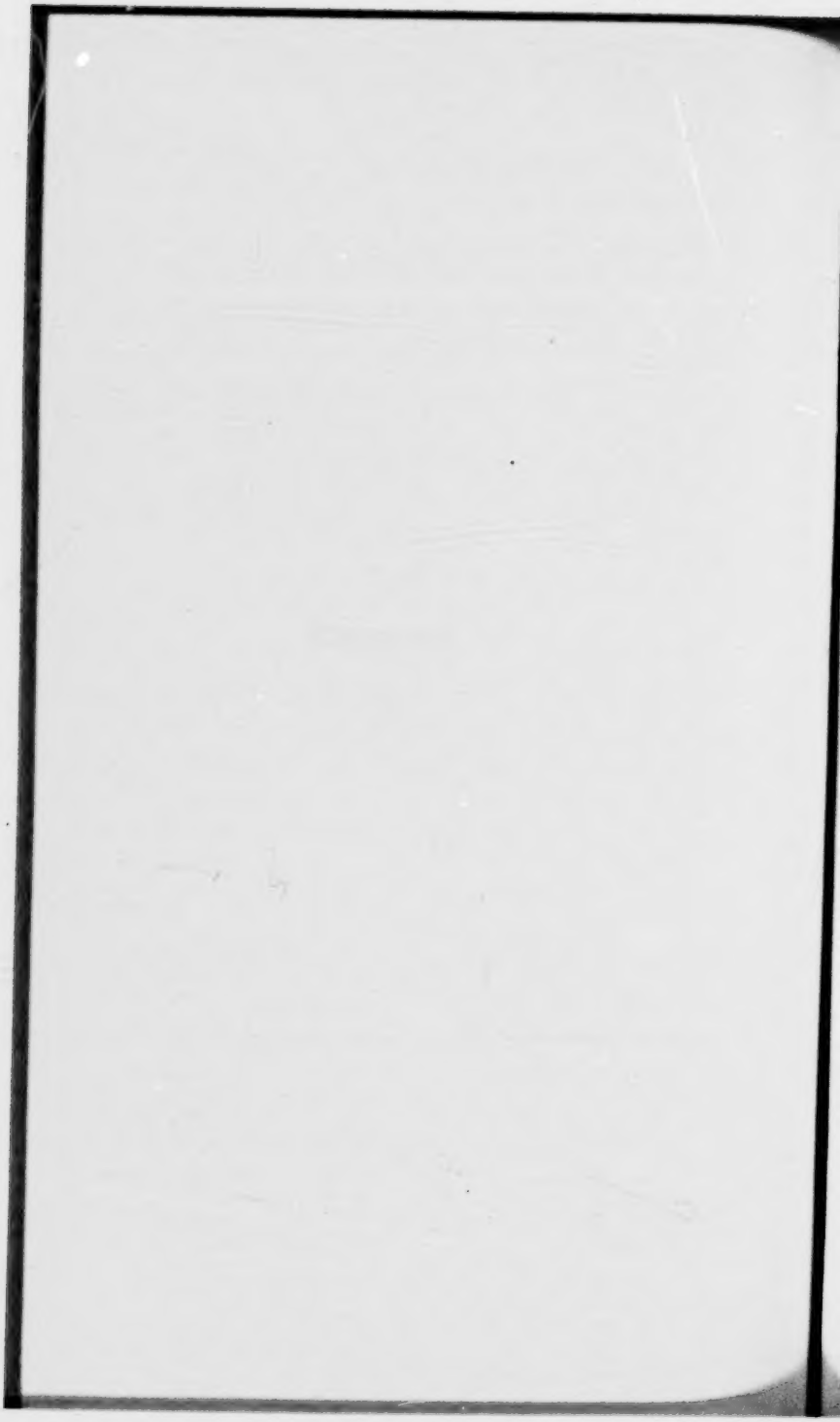
APPENDIX



APPENDIX

Order

In the
United States Court of Appeals
For the Sixth Circuit
(Filed November 24, 1972)

Deborah A. Northcross, *et al.*,

Plaintiffs-Appellees-Cross Appellants,

—v.—

Board of Education of the Memphis City Schools, *et al.*,

Defendants-Appellants-Cross Appellees.

Before:

Weick, Celebrezze and Peck,
Circuit Judges.

Upon due consideration, Plaintiffs-Appellees and Cross-Appellants' motion to file petition for rehearing and suggestion for rehearing en banc out of time is hereby denied.

Plaintiffs-Appellees' request for costs and attorneys' fees is hereby denied.

So ordered.

Entered by Order of the Court

James A. Higgins
Clerk

Appendix

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 71-2032 and 71-2033

FRANK V. THOMPSON, *et al.*,

Appellants,

v.

SCHOOL BOARD OF THE CITY OF NEWPORT NEWS, *et al.*,

Appellees.

Nos. 71-1993 and 71-1994

MICHAEL COPELAND, *et al.*,

Appellants,

v.

SCHOOL BOARD OF THE CITY OF PORTSMOUTH, *et al.*,

Appellees.

No. 72-1065

NATHANIEL JAMES, *et al.*,

Appellees,

v.

BEAUFORT COUNTY BOARD OF EDUCATION,

Appellant.

(Decided November 29, 1972)

Appendix

Before

HAYNSWORTH, *Chief Judge*,
WINTER, CRAVEN, BUTZNER, RUSSELL and FIELD,
Circuit Judges, sitting en banc.

PER CURIAM:

We ordered *en banc* consideration of lawyer fee claims in these school cases to consider the extent of the applicability of § 718 of the Emergency School Aid Act of 1972. In the City of Portsmouth and the Beaufort County cases, however, apparently adequate fees are allowable on other bases. The precise extent of the reach of § 718 in those cases, therefore, now appears academic.

In the Newport News case, most of the legal services are yet to be rendered, and we are unanimously of the view that, if relief is granted, fees will be allowable under § 718 for those future services. The division within the Court as to the application of § 718 will have some bearing upon any ultimate allowance of fees in that case, though less than was supposed when reargument was requested.

The Court is unanimously of the view that it should apply § 718 to any case pending before it after the Section's enactment. This is consistent with the principle of *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, most recently enunciated in the Supreme Court in *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268.

A majority of the Court, however, is of the view that only legal services rendered after the effective date of § 718 are compensable under it. Those members of the Court invoke the principle that legislation is not to be given retrospective effect to prior events unless Congress has clearly indicated an intention to have the statute applied in that manner. They do not find such an intention

from the omission of a provision in an earlier draft expressly limiting its application to services rendered after its enactment, when the earlier draft was extensively revised and there is no affirmative expression by any member of Congress of an intention that it should be applied to services rendered prior to its enactment.

A minority of the Court would apply § 718 to legal services, whenever rendered, in connection with school litigation culminating in an order entered after June 30, 1972. In their view, someone must pay the fee, and a statutory placement of the burden of payment on school boards is not a retroactive application of the statute, though some of the services may have been rendered before its enactment as long as an order awarding relief, the fruit of the services, is entered afterwards.

The cases will be remanded for such further proceedings in the District Court as may be necessary in accordance with the views of the majority, applying § 718, when it may otherwise be applicable, only to services rendered after June 30, 1972.*

In the *Portsmouth* case, the District Court will award reasonable attorneys' fees on the principle of *Brewer* v. *The School Board of the City of Norfolk*, 4 Cir., 456 F.2d 943 (1972). In the *Beaufort County* case, the award heretofore made by the District Court is approved.

Remanded.

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* In the *Newport News* case, on a completely different basis, the District Court made an award of attorneys' fees of $750.00 in connection with services and events occurring before June 30, 1972. Since that award was not dependent upon § 718, nothing we say here should be construed to disturb it.

WINTER, *Circuit Judge*, concurring specially:

I concur in the judgment of the court to the extent that it directs the allowance of attorneys fees in the *City of Portsmouth*, *Beaufort County* and *Newport News* cases. For the reasons set forth in my separate opinion in Bradley v. School Board of Richmond, —— F.2d —— (4 Cir., No. 71-1774, decided), I would direct the allowance in all three cases on the basis that § 718 of the Emergency School Aid Act of 1972 applies to legal services rendered before the effective date of that enactment in cases pending on that date.

Appendix

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-3030

PRINCESS RANOLA JOHNSON, ETC., ET AL.,

Plaintiffs-Appellees,

versus

M. BROWNING COMBS, Superintendent,
Grand Prairie Independent School District, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

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(December 6, 1972)

Before THORNBERRY, MORGAN and CLARK,
Circuit Judges.

CLARK, Circuit Judge: On the merits, the judgment appealed from is due to be affirmed. *Weaver* v. *Board of Public Education of Brevard County, Florida*, —— F.2d —— (5th Cir. 1972) [No. 71-3465, September 6, 1972].

The collateral question as to plaintiffs' entitlement to attorneys' fees below and on this appeal raises a novel issue. The law of the circuit prior to the passage of Sec-

tion 718 of the Education Amendments Act of 1972[1] made it clear that in school desegregation cases attorneys' fees would be awarded only if the school board was found to have acted in an "unreasonable and obdurately obstinate" manner. *See Williams* v. *Kimbrough*, 415 F.2d 874 (5th Cir. 1969), *cert. denied* 396 U.S. 1061, 90 S.Ct. 753, 24 L.Ed.2d 755 (1970) [citing *Kemp* v. *Beasley*, 352 F.2d 14 (8th Cir. 1965)], and *Horton* v. *Lawrence County Board of Education*, 449 F.2d 793 (5th Cir. 1971). The same rule has been applied in actions under 42 U.S.C.A. § 1982 (which, like *Williams and Horton*, were not governed by a statutory provision for attorneys' fees), *Lee* v. *Southern Homesites Corporation*, 429 F.2d 290 (5th Cir. 1969).

However, the enactment of Section 718 of the Education Amendments Act of 1972 requires that we answer three questions on this appeal: first, does the statute merely codify the existing "unreasonable and obdurately obstinate" standard, or does it set new parameters within which the district court must exercise its discretion; second, if the statute does create a new legal standard, to what degree should that standard be applied retroactively; and third, when is an order a "final order" within the meaning of the statute?

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[1] Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs.

Appendix

We note at the outset that Section 718 is similar, though not identical,[2] to the provision allowing attorneys' fees to the successful party in an action based on Title II of the 1964 Civil Rights Act.[3] In the leading case interpreting that provision, *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968), the Supreme Court held that attorneys' fees must be awarded "unless special circumstances would render such an award unjust." Rejecting "good faith" as a defense, the Court reasoned that,

> If Congress' objective had been to authorize the assessment of attorneys' fees against defendants who make completely groundless contentions for purposes of delay, no new statutory provision would have been necessary, for it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 Moore's Federal Practice, 1352 (1966 ed.).

390 U.S. at 403 *n.* 4, 88 S.Ct. at 966 *n.* 4.

Newman has been applied by this Court in *Miller* v. *Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970), where we concluded in another Title II action that neither the fact that a non-frivolous controversy existed nor the fact that the defendants acted in good faith con-

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[2] Section 718 requires a threshold finding by the trial court that the proceedings were necessary to enforce compliance.

[3] In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs, and the United States shall be liable for costs the same as a private person, 42 U.S.C. § 2000a-3(b).

stituted the "special circumstances" contemplated by the Supreme Court. Thus, the standard applied under the statutory language in Title II actions diverged somewhat from the standard applied in school desegregation cases by this Court and other Circuit Courts which have considered the question. *See Brewer* v. *School Board of City of Norfolk, Virginia*, 456 F.2d 943, 949 (4th Cir.), *cert. denied* —— U.S. ——, 92 S.Ct. 1778, —— L.Ed.2d —— (1972). That Congress chose to structure Section 718 in language similar to that interpreted by the Supreme Court in *Newman* is a strong factor indicating that the two statutes should be interpreted *pari passu*.

Moreover, in addition to the similarity of the language used in Section 718 and its Title II analogue, the two provisions share a common *raison d'etre*. The plaintiffs in school cases are "private attorneys general" vindicating national policy in the same sense as are plaintiffs in Title II actions. The enactment of both provisions was for the same purpose—"to encourage individuals injured by racial discrimination to seek judicial relief . . ." *See Newman, supra*, 390 U.S. at 402, 88 S.Ct. at 966. We hold that if the court finds that the proceedings were necessary to bring about compliance, then Section 718 must be applied in accordance with the test enunciated in *Newman, i.e.*, in the absence of special circumstances attorneys' fees are to be awarded.

We decline to apply § 718 retroactively to the expenses incurred during the years of litigation prior to its enactment. This interpretation of the neutral language of the statute is compelled both by the long-established presumption against retrospective application in the absence of a clear legislative intent and the clear precedents of this Circuit governing such litigation. School desegregation

litigation has produced precedents which have been somewhat less than clear and explicit. Even when plaintiff and defendant were in agreement about the end to be reached, the means and the timing which would accomplish the goal often remained in bitter dispute. There was a necessity that the demands of the aggrieved plaintiffs be harmonized with legitimate educational interests of the school authorities and the community as a whole in the smooth and uneventful transition to a unitary school system. Many school districts have been litigating in this field filled with fast changing precedents and guidelines for a number of years; to apply this statute retroactively would place a wholly unexpected and unwarranted burden on these districts who have done no more than litigate what they, in good faith, believed to be demands which exceeded the Constitution's demand.[4]

Under these circumstances, a retroactive application of this statute would punish school boards for good faith action in seeking the guidance of the courts to determine what was required of them. Furthermore, retroactive awards of attorneys' fees for these past years of litigation would not serve the purpose of encouraging future legal challenges of segregated school systems. The inconclusive legislative history of Section 718 furnishes no basis for inferring that Congress intended this provision to be given such a sweeping effect.

Thus, as to legal services awarded prior to July 1, 1972, the effective date of the Education Amendments Act of 1972, we hold that the award of attorneys' fees is to be

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[4] Of course if the litigation could be characterized as unreasonable and obdurately obstinate, then by the same reasoning as advanced in *Newman, supra*, Section 718 would be surplusage under the existing rule of *Williams* and *Horton*.

governed by the standard enunciated by this court in *Williams* and *Horton*. Awards for legal services rendered on or after that date are governed by the statute.

The brief order of the trial court indicates that the single standard applied there was the one set out in *Bradley* v. *School Board of City of Richmond, Virginia*, 53 F.R.D. 28 (E.D. Va. 1971). Without deciding whether the standard enunciated in *Bradley* is consistent with Section 718, we rule that *Bradley*, at least insofar as it holds that full and appropriate relief in school desegregation cases must include the award of expenses of litigation, 53 F.R.D. at 41, is inconsistent with the standard of this circuit applicable to legal services rendered prior to the effective date of the statute. Since the record indicates that some part of the legal services in this case may have been rendered prior to that date, we vacate the award of attorneys' fees and remand to the district court for further proceedings in accord herewith.

Section 718 expressly allows attorneys' fee awards only upon "the entry of a final order." The most suitable test for such finality exists in the body of law which has been developed in determining appealability under 28 U.S.C.A. § 1291. In general, this means a judgment or order which ends the litigation on the merits and comprehends only the execution of the court's decree. *See C. Wright, Federal Courts* § 101 (2d ed. 1970). Since most school cases involve relief of an injunctive nature which must prove its efficacy over a period of time, it is obvious that many significant and appealable decrees will occur in the course of litigation which should not qualify as final in the sense of determining the issues in controversy. The ultimate approach to finality must be an individual and pragmatic one. Such a matter should be committed to the determination of the trial court.

For the district court's guidance at the appropriate time, we now hold that plaintiffs are entitled to a reasonable attorneys' fee for prosecuting this present appeal, in the amount of 1,250 dollars. *See Meeks* v. *State Farm Mut. Ins. Co.*, —— F. 2d —— (5th Cir. 1972) [No. 71-2137, No. 2293, May 22, 1972]; *Campbell* v. *Green*, 112 F.2d 143 (5th Cir. 1940).

AFFIRMED in part,
VACATED in part and
REMANDED.